United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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76-1600

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P/S

United States Court of Appeals For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

In the Matter

of

EDWARD DI SERO,

A Witness Called Before the October 1975 Grand Jury in the Southern District of New York,

Appellant

On Appeal From The United States District Court For The Southern District Of New York

APPELLANT'S BRIEF

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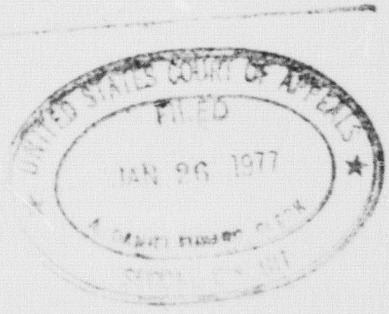

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UNITED STATES OF AMERICA,

Appellee,

In the Matter of EDWARD DI SERO,
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1975 Grand Jury in the Southern
District of New York,

Appellant

BRIEF FOR THE APPELLANT EDWARD DI SERO:

PRELIMINARY STATEMENT:

EDWARD DI SERO appeals from an order of the Honorable Thomas P. Griesa, a Judge of the United States District Court, Southern District of New York, made on December 27, 1976 committing EDWARD DI SERO to the Metropolitan Correction Center for civil contempt (28 U.S.C. 1826(a)(2)). EDWARD DI SERO promptly served and filed a Notice of Appeal to this Court (A31)*.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW:

A. Did EDWARD DI SERO wilfully commit civil contempt where his asserted refusal to respond to the questioning before the grand jury was based on an apprehension that the immunity provided for in 18 U.S.C. 6002 although formally conferred

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*( )This refers to the pagination of the Appendix furnished by EDWARD DI SERO.

was not effective?

B. Did the United States Attorney respond properly and sufficiently to the issue of whether electronic surveillance was a method or means used to subpoena the said EDWARD DI SERO, and whether the products of any electronic surveillance constituted the basis of the questions put to the said EDWARD DI SERO?

STATEMENT OF THE CASE AGAINST THE APPELLANT

The appellant appeared before the grand jury in the Southern District of New York on December 27, 1976 (A10). He was accompanied by counsel at such time. The United States Attorney had already applied for and received an order of immunity under 18 U.S.C. 6002. The order was made by the Honorable Thomas P. Griesa (A2, A3, A10, A12).

DI SERO in the grand jury room refused to respond to the questions put to him by the government. The grounds of DI SERO's refusal was a statement read to the grand jury or otherwise presented to the grand jury. The United States Attorney also had copies of such statement (A27-A30, A12, A13, A16).

Next, after the appellant's brief grand jury appearance, the appellant, counsel and the United States Attorney went before Judge Griesa. After hearing argument the Judge committed the appellant (A14, A15, A16, A17, A23, A25, A26).

POINT I:

THE APPELLANT'S REFUSAL TO RESPOND TO THE QUESTIONS PUT BEFORE THE GRAND JURY WAS BASED ON PROPER GROUNDS OR, PUT ANOTHER WAY, THERE WAS NO "JUST CAUSE" TO COMMIT THE APPELLANT.

It appears that the grand jury was investigating "syndicated gambling" (A11, A8). As appears "syndicated gambling" would be 18 U.S.C. 1955 and 18 U.S.C. 371. It is submitted that the basis for the appellant's refusal to respond to the questioning was the theoretical holding in Kastigar v. U.S. 406 U.S. 441 (1972), rehearing denied 408 U.S.C 931. The issue therefore before this Court as well as the Court below and as well as other cases hereinafter cited, was whether the "use" immunity afforded the appellant and other witnesses circumstanced as the appellant was, was readily enforceable. On pages 460-461 the Kastigar court, 406 U.S., stated in part that:

> "A person accorded this immunity..., and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities..."
>
> "This burden of proof, which we affirm is appropriate, is not limited to information a negation of taint; rather it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."
>
> "This is a very substantial protection, commensurate with that resulting from invoking the privilege itself. The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. ...This statute, which operates after a witness has given incriminatory testimony, afford the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties. ..."

This of course brings to the fore another issue. Assuming that an extra jurisdiction does prosecute a witness, and the witness availed himself of the right to testify truthfully, and he does testify in his own defense. There is nothing in Kastigar or in other decisions which would prevent the prosecutor from using the compelled testimony or its fruits from impeaching or attempting to impeach the testimony of the former grand jury witness now converted into a defendant in a criminal action in another jurisdiction. See Harris v. New York, 401 U.S. 222 (1971); Oregon v. Hass, 420 U.S. 714 (1975). See also U.S. v. Tramunti, 500 F. 2d 1334 (Cir. 2d, 1974) cert. denied 419 U.S. 1079 (1974).

This doesn't necessarily mean that the basis of the appellant's refusal was that he was not given a license to commit future perjury. That is not the issue at all. The issue is that leads from the compelled testimony could be utilized in another jurisdiction say a state court, but particularly a New York STate Court, to impeach the credibility of this witness converted to a defendant. What "perjury" is or was or would be is a very substantial question. Perjury is a wilful fabrication. It doesn't necessarily follow that the leads emanating from the appellant's testimony that could be used to contradict appellant's future testimony would constitute"perjury". The purposes of the impeachment could show failure of memory, lack of observation, bias, motive and the like.

28 U.S.C. 1826(a) provides that the witness' refusal is to be judged from the reference point of "just cause". The just cause here was adequately presented to the grand jury and to the court. It is submitted that"just cause" is the equivalent of "wilfulness" which is an element of criminal contempt. Appellant takes the position that there was no law against a refusal to respond to grand jury questioniong, or the questioning of any authorized investigator. It is the wilful refusal which constitutes the crime and "just cause" which is the offense resulting in civil contempt. See In Re Sadin, 509 F. 2d 1252 (Cir. 2d, 1975) at pages 1255, 1256; U.S. v. Hawkins, 501 F. 2d 1029 (Cir. 9th, 1974); cert. denied 95 S. Ct., 668 (1974) at page 1031.

It is now suggested that the "just cause" before the Court below was from the font of the Yale Law Journal,decisions of this Court, and most important from a writing by not just the U.S. Attorney that applied for the order of "immunity" but from Richard L. Thornburgh, an Assistant Attorney General of the Criminal Division of the Department of Justice.

The first element of the "just cause" was a Yale Law Journal note "Standards for Exclusion in Immunity Cases After Kastigar and Zicherelli,"82 Law Journal, 171 (1974) which sets forth proposed implementation for insuring the guarantees of the immunity sustained in Kastigar. The note acknowledged that

Kastigar did not provide any specific guidance for practicalizing the exclusinary rule flowing from immunized testimony. The note therefore suggested certain requirements which should be met "prior" to any future prosecution in order to insure in practice as well as in theory the grant of youth immunity and its co-extension with the 5th Amendment privilege against self-incrimination. The note reasoned that it is impossible to prove with any certainty that no use was made of the immunized testimony and that a subsequent prosecution may be based only on evidence which the prosecuting authorities had obtained prior to the grant of immunity. In order to obviate the problem the note recommended that all evidence be certified by the Court at the time that immunity is granted and that subsequent prosecutions be confined to evidence so certified. It was further proposed that a prosecutor be required to notify all other jurisdictions that they wish to prosecute a witness so as to give them an opportunity to certify their evidence and that such authorities be limited to the use of certified evidence in any subsequent prosecution.

In U.S. v. Catalano, et al., (Delacroce), 491 F. 2d 268 at page 272 this issue was considered by the Court in the sense that Delacroce testified before a New York State grand jury where he was given both testimonial and transaction immunity.

Paradoxically, the very prosecutor who conducted the state grand jury investigation became a United States Attorney and prosecuted Dellacroce and others for federal crimes. Clearly there were matters in the federal prosecution that were present in the state grand jury investigation. This Court held that firstly the former grand jury immunity (state) imposed a heavy burden on the government to show independent sources for the federal prosecution. In holding that the burden was met this Court stated that Dellacroce's testimony before the state grand jury was "circumspect in the extreme" resulting in a contempt conviction. Further that the type of questioning before the state grand jury indicated that the prosecutor already had evidence in regard to Dellacroce's transactions.

Meanwhile prior to that case in Goldberg v. U.S., 472 F. 2d 513, (Cir. 2d, 1973) footnote number 5, concurring opinion of Judge Oakes at page 516, read as follows:

> "Without endorsing everything said in Notes Standards for Exclusion in Immunity Cases... 82 Yale Law Journal, 171, 181-185 (1972) we would think that prosecutors both in their own interests and in fairness to the defendant, would do well to consider the certification of evidence available prior to the compulsion of testimony proposed at page 182..."

In applying for the order of "Immunity" the United States Attorney for the Southern District procured a letter dated November 23, 1976 signed by Richard L. Thornburgh who was an Assistant Attorney General in the criminal division (A6).

As can be expected, this letter manifested an approval for the U.S. Attorney's request to apply for an order of immunity to a Southern District Judge. In Volume 67 of the Journal of Criminal Law and Criminology, Number 2, there was an article by Richard A. Thornburgh who is described as an Assistant Attorney General, criminal division, United States Department of Justice, who on page 162 seemed to agree with the future conduct of the appellant in this case when he appeared before the grand jury. Mr. Thornburgh states as follows in part:

> "Some commentators seem to echo these courts resistance to the prosecutorial tool of 'immunity'. Especially notable is the proposal in the Yale Law Journal which suggests that prosecutors be required to have a court certify all evidence against a witness before he is compelled to provide testimony, that in a subsequent prosecution the government be restricted to using such only previously certified evidence, and that the prosecutors be required to swear that they have not had access to the immunized testimony or any information derived from it."
>
> "The first two features of this proposal are not particularly objectionable. Prior certification of evidence may in fact be an effective tool for prosecutors themselves to utilize as a means of proving that their evidence is independent of the immunized testimony. And while it seems unnecessary to require that a prosecutor swear that to the best of his knowledge, he has not directly or indirectly used immunized testimony, this idea is not inherently objectionable."
>
> "The remaining central aspect of the Yale Law Journal's proposal is more troubling. A requirement that the government, in any subsequent prosecution that touches upon the compelled testimony, use only evidence certified prior to the compelled testimony amounts to a requirement that the investigation of the witness for any related offenses seize upon his compulsion.

> Protecting a witness from all evidence obtained after such compulsion even if from entirely independent sources is similar in effect to transaction immunity. Not only does this requirement destroy the primary advantage of youth immunity statute, which is the ability to use evidence subsequently and independently developed but resurrects the primary disadvantage of transaction immunity statute in that witnesses could shield themselves from prosecution simply by mentioning past criminal activity in the course of their immunized testimony, provided it is pertinent to the inquiry at hand. ..."

Consequently, Mr. Thornburgh apparently did not find certain suggestions that were utlized by the appellant particularly objectionable. Furthermore, it is suggested that after considering Kastigar, a person circumstanced as the appellant is and was is still in doubt as to whether he is being afforded what the constitution promised in the 5th Amendment prohibition of self-incrimination. Nothing in Kastigar suggests that all the evidence connected with the produced testimony be excluded. The issue remains as to whether a prosecutor, federal or state, using the immunized testimony or knowing the immunized testimony or having leads from the immunized testimony, may not attenuate the taint. See also U.S.v. Hinton, Court of Appeals, 2nd Circuit, decided September 27, 1976, slip opinion page 5679 at pages 5686-5693.

POINT II:

THE APPELLANT'S REQUEST FOR A DISCLOSURE OF PRIOR ILLEGAL ELECTRONIC SURVEILLANCE WAS PROPER TO ESTABLISH JUST CAUSE FOR ANY REFUSAL TO ANSWER THE QUESTIONS.

The appellant when he initially appeared with counsel on December 27, 1976 also the day he was sent to jail, requested, information as to whether "he was subjected to electronic surveillance and/or wire tapping..." (A29). The request in the aforementioned respect is contained on pages A29-A30 of the Appendix. Of course the request was based on the ruling of Gelbard v. U.S., 408 U.S. 41 (1972). The United States Attorney's response during the brief hearing that preceded the jailing of the appellant, was qualified and is contained on pages A19-A20 of the Appendix. In brief, the U.S. Attorney stated that he was making the response based on "my knowledge"; that he was the only "special attorney" in regard to the investigation and that he also relied on a conversation with an agent of the Federal Bureau of Investigation. Then on the basis of the "collective knowledge" the U.S. Attorney told the Court that "we are personally unaware" of the results of any electronic surveillance directed against the appellant, that resulted in the interception of a conversation that the appellant was a party to or was conducted in premises which the appellant "owned, leased, licensed or otherwise had a propriety interest in", naming the premises (A20). The U.S. Attorney further stated that he

was unaware of anything that "come from any such surveillance" in response to the Court's inquiry. Asked whether he was aware of any surveillance, the oblique answer was that "there was no surveillance that was successful" (A20). The U.S. Attorney further stated he was not aware of any surveillance that was unsuccessful defining unsuccessful as "a surveillance that produced no results", (A20).

The government in its argument relied on In Re Millow, 529 F. 2d 770 (Cir. 2d, 1976). In Millow, there was a disclosure of warrants authorizing electronic surveillance, at pages 772-773. The issue wasn't this particular U.S. Attorney's "knowledge", nor was the issue what the agent may have personally known. There is an admission by the U.S. Attorney that "we are personally unaware of the results of any...surveillance" (A19, A20). Even this statement was qualified because it was limited to a lack of knowledge as to surveillance directed against the appellant or resulted in the interception in which the appellant participated. Then there is the final statement that the agent and the U.S. Attorney did not know of the surveillance in premises which the appellant may have "leased, licensed or otherwise had a propriety interest", (A20). While real estate interests are irrelevant to search and seizure problems, or to the problems associated with the 5th Amendment, an apparent analysis of this statement discloses that the appellant was in premises that may have been subjected to electronic surveillance.

The government's disclaimer is limited to one who had a "proprietary interest". What if the appellant were a guest in the premises? It is submitted he would still be an aggrieved person who can raise the issue.

In U.S. v. Bynum, 475 F. 2d 832 (Cir. 2d, 1973) in remanding that case to the trial court for a hearing, this Court clearly stated in regard to whether Bynum was an aggrieved person on pages 835 and 836 that:

> "...The Government further argued that neither Bynum or Cordovano has standing to raise the minimization question. Since the phone was in Garnet's home and listed in the name of one Fred Garnet, we have no doubt that she has properly raised the issue. Moreover Bynum was clearly an aggrieved person...and therefore was given leave to raise the question of the legitimacy of the conversation..."

It appeared from a narration of facts in that case, that Bynum was a "principal figure in the conspiracy, used as his headquarters a residence on Linden Boulevard in Brooklyn which was occupied by his paramour, the defendant Garnet..."

It can hardly be claimed that Garnet had "a proprietary interest" in his girlfriend's premises. He may have been a guest, and as a guest, he clearly was an "aggrieved person". Furthermore, notice may be taken that frequently in investigating gambling offenses the government uses electronic surveillance as a method of investigation. This was a gambling investigation.

See 11 Harvard Civil Rights, Civil Liberties Law Review, "Claiming Illegal Electronic Surveillance: An Examination of 18 U.S.C. 3504(a)(1)" where on page 659 it was stated in part that:

> "Because a United States District Attorney is often not aware of the source of leads provided by other government agencies, an adequate government response to a claim of illegal electronic surveillance must include statements from government officials in Washington. ... The majority view requires that only that inquiries be directed at seven agencies which have obtained permission from the Justice Department to conduct the electronic surveillance pursuant to the court order. A minority position is that any other agency with responsibility for the subject matter of the case should also be contacted..."

At page 660 it was further stated that:

> "Most courts have required that the government's response be in the form of a sworn affidavit. ...Courts have also insisted that the government's answer indicate which agencies were contacted, a requirement which is essential to the ascertainment of whether all relevant agencies were reached. ..."

Furthermore, in regard to standing Katz v. U.S., 389 U.S. 347 (1967) dealt with the question that a person may have "standing" in regard to a place where that person has a reasonable expectation of privacy. Consequently, a guest or a person lawfully in any premises has a "reasonable expectation of privacy" in regard to conversations. Mere legal presence in premises affords a person standing. See Mancusi v. DeForte, 392 U.S. 364. See also Baker v. U.S., 401 F. 2d 958 where the defendant was deemed to have standing in regard to a hotel suite which he frequently used even though it was rented to someone else the Court holding that the presence of the defendant there conferred standing.

CONCLUSION:

THE ORDER OF COMMITMENT SHOULD BE VACATED AND THE APPELLANT RELEASED.

Respectfully submitted,

ARNOLD E. WALLACH
Attorney for the Appellant

WALLACH

U.S. Att
1 St. And
NYC

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 26 day of Jan. ,19 77 at No. 1 St. Andrews Plaza, NYC

deponent servied the within BRIEF

upon U.S. Atty., So. Dist. of NY

the Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
26 day of Jan. 1977

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978